IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. BRIAN MICHAEL ARANDA, Defendant and Respondent.	)	S214116 (Fourth Appellate District, Div. 2, No. E056708; Riverside Superior Court No. RIF154701; Hon. Michele D. Levine Judge.)

Application to File Amicus Curiae Brief and Amicus Curiae Brief in Support of Respondent the People of the State of California

Mitchell Keiter, SBN 156755
The Beverly Hills Law Building
424 South Beverly Drive
Beverly Hills, CA 90212
Tel. (310) 553-8533
Mitchell.Keiter@gmail.com

Mailing List

Virginia Blumenthal
Blumenthal Law Offices
3993 Market St
Riverside CA 92501

Kelli Catlett
Riverside District Attorney's Office
Appellate Division
3960 Orange St
Riverside, CA 92501 (electronically delivered)

California Attorney General
110 West "A" St
Suite 1100
San Diego. CA 92101

Hon. Michele D. Levine
Riverside Superior Court
Hall of Justice
4100 Main St
Riverside, CA 92501

Appellant Defenders, Inc.
555 West Beech St
Suite 300
San Diego, CA 92101 (electronically delivered)

Court of Appeal
Fourth Appellate District, Division Two
3389 Twelfth St
Riverside, CA 92501

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. BRIAN MICHAEL ARANDA, Defendant and Respondent.	)	S214116

Mitchell Keiter's Application to File Amicus Curiae Brief in Support of Respondent the People of the State of California

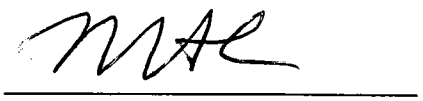
To the Honorable Tani Cantil-Sakauye, Chief Justice, and the Honorable Justices of the Supreme Court of the State of California:

Mitchell Keiter hereby applies for permission to file a brief as amicus curiae in support of Respondent The People of the State of California, pursuant to Rule 8.520(f) of the California Rules of Court.

Pursuant to the Order granting review, this Court will address the continuing validity of *Stone v. Superior Court* (1982) 31 Cal.3d 503, a case evaluated in *People v. Fields* (1996) 13 Cal.4th 289. As the attorney who

briefed and argued *Fields*, and a former professor who has written on the subject (see Keiter, *The Mauled Verdict: The* Knoller *Verdict Shows Why Res Judicata Should Protect Partial Convictions As Well As Acquittals* (2002) 33 McGeorge L. Rev. 493; see also Keiter, *From* Apprendi *to* Blakely *to* Cunningham*: Popular Sovereignty Enters the Courtroom* (2007) 34 West. St. L. Rev. 1), amicus curiae has maintained a special interest and familiarity with the subject. If this Court grants this application, amicus curiae requests that the Court permit the filing of this brief which is bound with the application.

Dated: May 27, 2014



Mitchell Keiter

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Amicus Curiae Brief in Support of Respondent the People of the State of California

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Issues Presented

1. Did *Stone v. Superior Court* (1982) 31 Cal.3d 503, construe the state constitution to provide double jeopardy protection beyond that guaranteed by the federal constitution?

2. If not, do cogent reasons now warrant that extension?

Statement of Case and Facts

Amicus curiae relies on the statements presented in the People's briefing.

Argument

I. *Stone v. Superior Court* did not rely on the California Constitution, Article I, section 15.

More than 30 years ago, this Court created a rule in which courts needed to ask deadlocked juries to return any possible partial verdicts of acquittal as to greater included offenses even though they could not resolve all the charges. (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 519.) The Court held "double jeopardy principles" forbade retrial after such a partial finding, without specifying whether it was relying solely on the Fifth Amendment to the United States Constitution or also on Article I, section 15, of the California Constitution. For three decades, it was a moot point.

In 2012, however, the United States Supreme Court held that the Fifth Amendment did not compel such a rule. (*Blueford v. Arkansas* (2012) 132 S.Ct. 2044.) This Court must therefore decide whether *Stone* relied on the California Constitution to extend the federal double jeopardy rule, and, if it did not, whether cogent reasons exist to do so now.

A. Stone's *reference to independent state grounds did not show the Court intended to construe the California double jeopardy bar more broadly than its federal counterpart because this Court routinely cites the doctrine of independent state grounds even where it finds the state and federal constitutions coterminous.*

Defendant contends *Stone* relied on the California Constitution because it reiterated that the California Constitution could provide protections greater than those guaranteed by the United States Constitution.

> [W]e are mindful that the double jeopardy clause of the Fifth Amendment applies to the states through the general provisions of the Fourteenth Amendment. [Citation.] Thus, the minimum standards of double jeopardy protection for criminal defendants, as enunciated by numerous United States Supreme Court decisions, are binding on this court. Of course, we remain free to delineate a higher level of protection under article I, section 15 (formerly § 13), of the California Constitution. (*Stone, supra*, 31 Cal.3d 503, 509-510.)

(RB 10, 12-13.)

This reference to the independent state ground of the California Constitution is so central to defendant's argument that he cites it twice, concluding that it would be mere dicta if the Court did not actually hold that the California Constitution provided greater double jeopardy protections than the United States Constitution. (RB 14.) In sum, defendant contends that because this Court in *Stone* confirmed it *could* construe Article I, section 15 more broadly than the Fifth Amendment, it

proves that it *did.*

The reference to independent state grounds, however, is one the California Supreme Court routinely makes when constitutional issues arise, even when the Court concludes the federal and state constitutions are coterminous.

> Because the California Constitution is a document of independent force, the rights it guarantees are not necessarily coextensive with those protected by the federal Constitution. (Citation.) We do not believe, however, that the protection against the establishment of religion embedded in the California Constitution creates broader protections than those of the First Amendment.

(*East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal.4th 693, 718.)

> [F]ederal law sets the minimum standards of double jeopardy protection. Under California law, in some instances an accused may be entitled to greater double jeopardy protection than that afforded under the federal Constitution. [¶.] [But] we discern nothing in the state decisions suggesting it is any more plausible under California law than under federal law to construe a jury's explicit failure to either acquit or convict as an implied acquittal.

(*People v. Fields* (1996) 13 Cal.4th 289, 302-303.)

> The California Constitution is a document of independent force and effect that may be interpreted in a manner more protective of defendants' rights than that extended by the federal Constitution .... (Citation omitted.) [¶.] Under the circumstances of the present case, we find no reason to construe the California Constitution to afford greater protection than the federal Constitution.

(*People v. Monge* (1997) 16 Cal.4th 826, 844.)

Stone's reference to independent state grounds does not show the Court intended to construe the state constitutional protection against double jeopardy more broadly than the federal protection.

B. *The circumstances of the state constitutional protection's enactment do not support a broader construction.*

This Court has explained how it considers the circumstances of the state constitutional provision's enactment in determining its breadth. The state re-adopted its current establishment clause in 1974, without signaling a desire to expand the protection beyond that which its federal counterpart already covered.

> Presumably, the electorate intended that the right being added to article I, section 4 through the new establishment clause would afford the same protection as the establishment clause of the First Amendment on which it was patterned. There is nothing in the history of the clause to suggest that the drafters or the electorate intended that the clause be any more protective of the doctrine of separation of church and state than the First Amendment establishment clause.

(*East Bay*, *supra*, 24 Cal.4th 693, 718-719.)

The *East Bay* court concluded that the need for a cogent reason to depart from the construction of the is even greater "when the expressly stated purpose of the provision was to add a protection already part of the federal Constitution to our charter of liberties." (*Id.* at p. 719.) The state double jeopardy protection was adopted as part of the same

constitutional revision that enacted the state establishment clause. The *East Bay* reasoning thus compels the conclusion that the state double jeopardy protection likewise served to incorporate the protection already guaranteed by the United States Constitution into the California Constitution.

There are some occasions where this Court has construed a state constitutional protection more broadly. In *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, the Court explained that the state constitutional right of privacy was designed to exceed the right protected by the federal constitution. Whereas the United States Constitution protects privacy only implicitly, the California electorate approved an initiative "whose purpose was to provide *explicit* protection of the right of privacy in the state Constitution." (*Id.* at p. 326, emphasis added.) This Court thus construed the state privacy right to protect private decisions that the federal constitution did not cover. (*Id.* at pp. 326-328.)

The Court likewise construed California's speech protection more broadly than its federal counterpart in *Gerawan Farming v. Lyons* (2000) 24 Cal.4th 468. The Court contrasted the two provisions, including the texts themselves, and concluded California's was broader in reach. (*Id.*

at pp. 491-493, 516.) Again, the Court weighed the motivations of those who framed the protection. (*Id.* at p. 495.) The Court recalled how California's early, individualistic culture shaped the state's protection of speech, and concluded that the construction of the state provision should reflect the intent of its framers and their preference for a fully open exchange of information. (*Id.* at p. 495.) The *Gerawan* court thus expressly declined to rely on the United States Supreme Court's construction of the First Amendment in delineating the speech protection available under the California Constitution, and indeed reached a contrary conclusion. (*Id.* at pp. 497, 509.)

There is no comparable ground for construing Article I, section 15 of the California Constitution more broadly than the Fifth Amendment to the United States Constitution. As noted, the 1972 initiative in which voters enacted the current version of section 15 was designed "to add a protection already part of the federal Constitution to our charter of liberties." (*East Bay, supra*, 24 Cal.4th 693, 719.) In contrast to the privacy and speech protections at issue in *American Academy, supra*, 16 Cal.4th 307, and *Gerawan, supra*, 24 Cal.4th 468, there was no comparable public demand for magnified protection. In fact, the electorate in 1982 voted to align section 15 with the Fifth Amendment,

at least regarding another trial procedure, that of impeaching defendants with statements taking in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct 1602, 16 L.Ed.2d, 694].) (*People v. May* (1988) 44 Cal.3d 309, 315.)

The electorate even voted to align section 15 with the Fifth Amendment in its entirety, and thus in the instant double jeopardy context. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 342-343.) *Raven* held this alignment was procedurally invalid, as it exceeded the permissible scope of the initiative process. (*Id.* at p. 341, 349-355.) This Court is therefore not *legally bound* to construe the federal and state double jeopardy provisions identically. But the context of the initiative militates against the contrary imperative present in *American Academy*, *supra*, 16 Cal.4th 307, and *Gerawan*, *supra*, 24 Cal.4th 468, -- namely, that the circumstances of the adoption of section 15 reflect a public demand for protection beyond that available under the United States Constitution.

C. *This Court does not expand the double jeopardy bar* sub silentio.

This Court has observed the language of the Fifth Amendment and Article I, section 15 is "very similar," and their purpose is the "same." (*People v. Statum* (2002) 28 Cal.4th 682, 693; *People v. Hernandez* (1998) 19 Cal.4th 835, 842; *People v. Fields, supra*, 13 Cal.4th 289, 303.) This Court may determine that the California Constitution provides additional protection to a defendant upon a showing of "cogent reasons," but that affirmative determination cannot be made *sub silentio*. If this Court is to conclude that Article I, section 15 differs from the Fifth Amendment here, it must identify cogent reasons for doing so.

Such an outcome would be the exception, not the rule. This Court usually has construed the two provisions as coterminous. (See e.g. *People v. Statum, supra*, 28 Cal.4th 682, 693-694; *People v. Hernandez, supra*, 19 Cal.4th 835, 842; *People v. Monge, supra*, 16 Cal.4th 826, 844; *People v. Fields, supra*, 13 Cal.4th 289, 303; *People v. Saunders* (1993) 5 Cal.4th 580, 596.) Indeed, the Court's more recent analysis in *People v. Sloan* (2007) 42 Cal.4th 110, did not even address the alternative ground of section 15 for finding a double jeopardy violation. (*Id.* at pp. 110-121.)

This Court's decision in *Cardenas v. Superior Court* (1961) 56 Cal.2d 273, does not advance defendant's instant argument. Citing the forerunner to the current section 15, Cardenas declined to follow *Gori v. United States* (1961) 367 U.S. 364 [81 S.Ct. 1253, 6 L.Ed.2d 901], where the United States Supreme Court construed federal double jeopardy law to permit retrial when the court granted a mistrial for the defendant's benefit but without his consent. (*Cardenas, supra*, 56 Cal.2d at pp. 275-276.) There was no doubt that *Cardenas* relied on the state double jeopardy protection because the federal protection did not yet apply to the states. (See *Benton v. Maryland* (1969) 395 U.S. 784, 794 [89 S.Ct. 2056, 23 L.Ed.2d 707].) *Cardenas* expressly rejected the federal model in favor of the state alternative. (*Cardenas, supra*, at p. 276.) (In finding there that a mistrial required a defendant's *consent* and not just his *benefit*, *Cardenas* implemented the California value favoring individual decisionmaking autonomy that produced a distinctive state constitutional right in *Gerawan, supra*, 24 Cal.4th 468, and *American Academy, supra*, 16 Cal.4th 307. The instant case does not similarly demand a broader protection to implement that distinctive California value.) *Cardenas* does not aid defendant, as it unmistakably rested on the only constitutional double jeopardy bar then available, the California

Constitution. By contrast, the Fifth Amenment's application to the states when this Court decided *Stone*, *supra*, 31 Cal.3d 503, enabled that court to base its decision on federal constitutional law.

Accordingly, *People v. Batts* (2003) 30 Cal.4th 660, is the exception that proves the rule. In grounding its decision on the state double jeopardy bar, this Court meticulously explained why the federal standard was inadequate to protect a defendant's rights, and cogent reasons thus justified creating a broader state protection. (*Id.* at pp. 687-695.) "Accordingly, we conclude that 'cogent reasons . . . exist' for construing the double jeopardy clause of the state Constitution differently from its federal counterpart. . . ." (*Id.* at p. 692.) *Stone* never identified a cogent reason for creating a different state constitutional standard, or even acknowledged it was creating one at all.

Neither *Cardenas*, *supra*, 56 Cal.2d 273, nor *Batts*, *supra*, 30 Cal.4th 660, supports defendant's instant position that this Court construes state constitutional provisions more broadly than federal counterparts without identifying cogent reasons for doing so.

Of course, this Court may nevertheless now identify a cogent reason for a broader state constitutional rule to apply. Defendant's offered reason, however, is not a cogent reason, and does not support a

different construction of the state double jeopardy rule.

II. No cogent reason supports a broader state constitutional rule.

A. *Defendants do not suffer any unfairness in the current system.*

Defendant suggests that the cogent reason is the need to ensure fairness in pleading. He contends that the partial acquittal option of *Stone v. Superior Court, supra,* 31 Cal.3d 503, and thus a broader construction of California's double jeopardy protection, is needed to prevent the People from denying defendants the benefits of the favorable outcome they would receive if People charged the lesser included offenses separately. (RB 14-15.)

This theory posits that a defendant will benefit where the People charge included offenses separately. For example, if the People charge simple kidnaping (Pen. Code, § 207) and kidnaping for ransom/robbery (aggravated kidnaping) ((Pen. Code, § 209) in separate counts rather than as included offenses, the defendant would benefit if the jury believed the defendant was not guilty of the greater charge but deadlocked as to the lesser. Under this theory, a jury that concluded that the defendant did not commit a kidnaping for ransom/robbery, but was unsure of whether he committed a kidnaping at all, would return a

not guilty verdict for the section 209 aggravated kidnaping count (which would enjoy preclusive effect on retrial), even as it failed to return any verdict for the lesser offense of section 207 simple kidnaping.

Of course, separate charging could also benefit the People. This was the outcome in *People v. Fields*, *supra*, 13 Cal.4th 289.
The court separately instructed the jury to consider, inter alia, the greater charge of gross vehicular manslaughter while intoxicated (count I) and the lesser charge of "simple" vehicular manslaughter while intoxicated (count II). (*Id.* at p. 296.) The jury returned a guilty verdict as to the lesser but deadlocked on the greater. (*Id.* at pp. 296-297.)

Amicus submits that if juries consider lesser included offenses as separate counts, the *Fields* outcome is far more likely than defendant's hypothetical. Juries naturally tend to consider the minimum elements of crime (the lesser offense) before considering those distinguishing the greater from the lesser: *A jury must first determine whether the defendant committed a kidnaping before it can determine his motivation.* The jury would thus first consider whether the defendant's conduct satisfied the elements of the lesser offense of simple kidnaping. Only after deciding that could it determine whether "the" kidnaping was for the purpose of ransom or robbery.

The same is true for homicide. A jury must determine whether the defendant did the alleged act, whether that act proximately caused the decedent's death, and whether the defendant acted with malice. Only after deciding that the defendant committed a murder may the jury decide whether that murder was premeditated or not. As the Supreme Judicial Court of Massachusetts has observed:

> Deadlock may occur over threshold issues (e.g., identification) with little or no deliberation concerning the specific elements that would differentiate between the offense as charged and the lesser included offenses. . . . **A jury may logically start their discussion with a consideration of the lowest lesser included offense, as, by definition, the lesser included offenses comprise the "building blocks" of the elements that lead up to the offense as charged.**

(*Commonwealth v. Roth* (2002) 437 Mass. 777 [776 N.E.2d 437, 449] (emphasis added).

Therefore, contrary to defendant's premise, if the People's charging separate counts for each offense (rather than charging a single count with lesser included offenses) permitted separate, independent verdicts enjoying preclusive effect on future proceedings, it is the People, not the defendant, who would benefit. The jury would be far less likely to acquit the defendant formally of a greater charge (while deadlocking on the lesser) than to convict on the lesser and deadlock on the greater. (See e.g. *People v. Bailey* (1974) 38 Cal.App.4th 693, 700: "The evidence that

Bailey was guilty of kidnaping was overwhelming, but it left considerable doubt as to whether he was guilty of the aggravated offense of kidnaping for the purpose of robbery.")

The People do not benefit from such separate charging, however, because *Fields* construed Penal Code section 1023 to force prosecutors to elect either to retain the lesser conviction *or* retry on the deadlocked greater charge.[1] This forced election is a not a constitutional command but a policy choice, as is the rule that courts may not declare a mistrial as to a lesser offense without first asking the jury if it can acquit of the greater charge. (*Stone, supra*, 31 Cal.3d at p. 519.) The question presented for California is not so much whether cogent reasons exist for construing the state constitution to demand that latter *Stone* rule in the abstract, but whether they exist to compel the *Stone* rule *in light of Fields*.

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[1] *Fields* followed *People v. Greer* (1947) 30 Cal.2d 589, where the Supreme Court held the conviction of a lesser offense barred subsequent prosecution of a lesser offense. (*Fields, supra*, 13 Cal.4th at p. 296.) In deriving this rule, however, *Greer* relied on cases where the People did not initially charge all the included offenses together, but charged them sequentially for tactical advantage. (See California District Attorneys Association Amicus Curiae Brief in Support of the Real Party in Interest the People of the State of California (2008 WL 795420) 21-24.)

B. *This Court should authorize either piecemeal or plenary verdicts on an evenhanded basis between the People and defendants.*

There are two basic models governing trials and retrials concerning offenses involving lesser included charges. Many such proceedings will involve what may be termed a "zero nonunanimous verdict," where the jury is not unanimous in determining the defendant's level of guilt, but zero jurors find her guilty of a particular level. In sum, the jury cannot agree on which level of guilt applies, but can agree on which level does *not* apply.

The first, "piecemeal" model, invites juries to determine whatever charges they can, even if they cannot unanimously resolve all of them. This policy accepts partial verdicts to grant "terminal effect . . . to such an unequivocally expressed conclusion of a jury." (*Stone, supra*, 31 Cal.3d 502, 510.) If all jurors agree that a defendant is not guilty of murder, a conviction for murder should not be an option for a future jury.

The other, "plenary" model does not invite such partial verdicts, and thereby enables subsequent juries to consider the charges unconstrained by the first jury's incomplete decisionmaking. This model avoids any "potential for juror confusion and/or speculation"

upon retrial. (*Fields*, *supra*, 13 Cal.4th at p. 307, fn. 5.) It also avoids the potentially coercive effect of a request to the first jury for a partial verdict. (*Commonwealth v. Roth*, *supra*, 437 Mass. 777 [776 N.E.2d 437, 448-449].)

Both models have their merits, but California alternates between the two, favoring piecemeal review when the first jury reaches a partial verdict of acquittal, but plenary review when the first jury reaches a partial verdict of conviction. Amicus submits there is no cogent reason supporting such an asymmetrical model. If, as *Fields* holds, there is a potential for juror speculation or confusion if the first jury's conviction constrains the second jury's deliberation, there is a similar potential where an initial verdict of acquittal does the same. The procedural asymmetry risks affecting the substantive outcome of the proceedings.

Consider a hypothetical murder defendant. He concedes he fatally shot the victim but asserts he acted in self-defense. The jury must answer two essential questions to determine the defendant's level of guilt: Did the defendant act with an actual belief in the need for self-defense, and was that belief reasonable? To simplify the hypothetical,[2]

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[2]The initial vote will track that of *Stone*, *supra*, 31 Cal.3d 503. *Stone* did not describe the facts of the case, although the possible verdict of justifiable homicide suggests it was a self-defense case. The presence

the jury could reach one of the three outcomes: (1) murder (the defendant did not actually believe in the need for self-defense); (2) manslaughter (there was an actual belief but it was unreasonable); or (3) not guilty/justifiable homicide (there was an actual and reasonable belief).

Now suppose the first jury agrees that there could not be a reasonable belief, but cannot unanimously decide on whether there was an actual belief. In other words,

Murder	Six votes
Manslaughter	Six votes
Not guilty	Zero votes

Under a **plenary model**, the People could again charge both murder and manslaughter on retrial. Suppose the second jury, unlike the first, agrees unanimously that the defendant actually believed in the need for self-defense, but cannot agree on whether that belief was reasonable.

Murder	Zero votes
Manslaughter	Six votes
Not Guilty	Six votes

Absent a full resolution, the case may go to a third jury, which again could consider all levels of guilt (murder, manslaughter, justifiable

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of an involuntary manslaughter option may have existed because the case predated *People v. Blakely* (2000) 23 Cal.4th 82.

homicide/not guilty) under the three respective theories (no actual belief, actual but unreasonable belief, reasonable belief). So if they agreed that there was no unreasonable belief, but disagreed on whether there was a reasonable belief (or no belief at all), there would again be a deadlock.

Murder	Six votes
Manslaughter	Zero votes
Not Guilty	Six votes

After the conclusion of three hung juries, there would have been 12 votes for murder, 12 votes for manslaughter, and 12 votes for not guilty. There would be no conclusive verdict due to these juries' disagreements.

Now consider the same series of trials under a **piecemeal model**. The first jury's deadlock between murder and manslaughter would enable the second jury to consider both charges, as well as not guilty. But the second jury's split between manslaughter and not guilty would preclude the third jury from considering murder. (*Stone*, *supra*, 31 Cal.3d 503.) The "unequivocally expressed conclusion" of the second jury that defendant had an actual belief would be given "terminal effect" and estop the third jury, but the first jury's similarly "unequivocally expressed conclusion" that the defendant lacked a reasonable belief would not. The first jury's findings would be ignored and the second

jury's would be imposed on the third jury.

This constraint, and refusal to allow plenary review, could further distort the decisionmaking process. What would happen to this jury where all the jurors rejected the "unreasonable belief" manslaughter theory, but half thought there was no belief at all (so the defendant was guilty of murder) but the other six jurors found a reasonable belief and favored acquittal? Under the plenary model described above, there would be another mistrial. But because under piecemeal review the only basis for convicting the defendant of homicide would be to find he harbored an unreasonable belief, those six jurors who believed he lacked any actual belief would be obligated to reject that manslaughter charge and acquit. The defendant would have achieved full exoneration despite there not being a single jury that deemed him not guilty.

At the end of the day, it would be the asymmetrical nature of the piecemeal review process, and not any jury conclusion about the defendant's blamelessness, that would produce a full acquittal.

C. *A mistrial is a legal necessity when jurors disagree as to a lesser charge, even if they agree to acquit on the greater.*

Although a fourth trial would hardly be an "optimal" outcome, the hypothetical at least illustrates a defect in *Stone*'s reasoning. After recognizing that legal necessity to declare a mistrial appears where the jury cannot agree, and the court may thus "reset for trial," *Stone* held that a mistrial declared upon a deadlock as to the lesser offense is without legal necessity unless the jury has been invited to return an acquittal on the greater charge. (*Stone, supra*, 31 Cal.3d 503, 516, 519.) An unnecessary mistrial terminates jeopardy, so *Stone* found a double jeopardy violation. (*Id.* at pp. 516, 519.)

But a mistrial *was necessary* because the jury had not determined the lesser, manslaughter charge. Whether or not the court inquired about a murder acquittal, the matter would need to be "reset for trial" to resolve the lesser charge. A defendant surely enjoys the "valued right to have the trial concluded by a particular tribunal," as a single-jury resolution may limit the financial and emotional burdens on the accused, shorten the period in which he is stigmatized by an unresolved accusation of wrongdoing, and even minimize the risk of erroneous conviction. (*Arizona v. Washington* (1978) 434 U.S. 497, 503-504 [98 S.Ct. 824, 54 L.Ed.2d 717].) But that interest in having a single jury

decide the defendant's fate "is sometimes subordinated to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." (434 U.S. at p. 505.) The hopeless deadlock as to the manslaughter charge created the legal necessity to justify a retrial and comply with the double jeopardy rule. Under a plenary model, it also would support an "impartial jury," i.e., one that could consider all theories and levels of guilt, and whose evaluation of the evidence would not be censored by the first jury's opinion.

D. *The* Stone *rule creates undue pressure on the initial jury to reach an decision in the defendant's favor.*

As seen in Argument IIB, ante, the acquittal-first policy can improperly influence the decisions of subsequent juries. But the greater problem lies with the undue influence it exercises on the initial deadlocked jury.

> [A] judge's inquiry concerning partial verdicts cannot avoid communicating to the jury the judge's desire to salvage something from the trial. However the inquiry is articulated or explained, the import of the inquiry is unmistakable: "Can't you at least decide a part of this case?" The inquiry, by its nature, plays on the deadlocked jurors' natural sense of frustration, disappointment, and failure. The jurors are confronted with the request, and asked to absorb its inherent complexity, at the worst possible time, when they are tired, anxious to be discharged, and perhaps angry at fellow jurors whom they blame for failing to reach agreement. While technically inquiring only as to what the jurors have already agreed on, the request for partial verdicts broken down by lesser included offenses implicitly suggests that the jurors should try just a little bit harder to come back with at least a partial decision to show for all of their efforts.

(*Commonwealth v. Roth, supra*, 437 Mass. 777 [776 N.E.2d 437, 448].)

The Massachusetts high court would have no confidence in a verdict returned under those conditions, as there would be "too great a risk that such a verdict would merely be the product of one hasty, final attempt to satisfy the judge's apparent desire for some form of decision on the case." (776 N.E.2d at p. 448.)

The coercive effect of *Stone* is even worse, because unlike a

verdict-first rule inviting juries to resolve any possible partial issues, *Stone* "invites" *only one kind of verdict.* The potentially "coercive intrusion into the function of the jury" operates in only one direction, towards a finding of not guilty; the jury will never receive such pressure to convict.

Amicus curiae perceives no cogent reason to preserve this pressure.

Conclusion

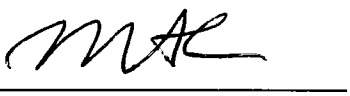
Stone v. Superior Court, supra, 31 Cal.3d 503, did not construe Article I, section 15 of the California Constitution – one way or the other. It did not conclude the state constitution did, or did not, bar retrial, because the federal constitution apparently did. There was no special demand among Californians for a broader rule, quite the contrary. This Court should decline to find that, for the first time ever, the Supreme Court extended the federal double jeopardy protection *sub silentio.*

This Court could extend the rule in this case if cogent reasons thus warranted. But they do not. The current procedure improperly shapes the deliberations of both the initial jury and its successor(s). Requesting that juries acquit of any offenses possible is neither a constitutional imperative nor a desirable policy.

Defendants enjoy the guarantee that they cannot be convicted of an offense unless 12 jurors unanimously determine they are guilty beyond a reasonable doubt. The United States Supreme Court has already recognized that these protections adequately protect defendants from improper conviction, and the federal constitution does not demand an acquittal-first procedure. There is no cogent reason for this state to hold otherwise.

Amicus curiae joins the People's request to reverse the lower court's finding and remand the matter for a retrial on first degree murder.

Dated: May 27, 2014



Mitchell Keiter

Certification of Word Count
(Cal. Rules of Court, rule 8.204(c).)

I, Mitchell Keiter, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 4,883 words, excluding tables, this certificate, and any attachment permitted under rule 8.204(d). This document was prepared in WordPerfect word-processing program, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: May 27, 2014

Mitchell Keiter

Proof of Service

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action.

On May 27, 2014, I served the foregoing document described **AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT THE PEOPLE OF THE STATE OF CALIFORNIA** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list. I deposited such envelope in the mail at Beverly Hills, California. The envelope was mailed with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 27th day of May, 2014, at Beverly Hills, California.

Mitchell Keiter

Mailing List

Virginia Blumenthal
Blumenthal Law Offices
3993 Market St
Riverside CA 92501

Kelli Catlett
Riverside District Attorney's Office
Appellate Division
3960 Orange St
Riverside, CA 92501 (electronically delivered)

California Attorney General
110 West "A" St
Suite 1100
San Diego. CA 92101

Hon. Michele D. Levine
Riverside Superior Court
Hall of Justice
4100 Main St
Riverside, CA 92501

Appellant Defenders, Inc.
555 West Beech St
Suite 300
San Diego, CA 92101 (electronically delivered)

Court of Appeal
Fourth Appellate District, Division Two
3389 Twelfth St
Riverside, CA 92501